AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 27 October 2023

Daily Civil Law
A Daily Bulletin listing Decisions of Superior Courts of Australia

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

Scarati v Republic of Italy (FCA) - Italian consulate employee failed in contractual employment claim, but succeeded in his claim based on an award (I B)

Bloc Constructions (ACT) Pty Ltd v ABS Façade (ACT) Pty Ltd (FCA) - construction company failed in challenge to adjudication under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (I B C)

Nguyen v Rickhuss (NSWCA) - class action by women who had had breast augmentation surgery raised common questions of fact and law, and should be permitted to proceed as representative proceedings (I B)

Farriss v Axford (NSWCA) - boat hirer who injured his hand in the anchor mechanism failed in negligence action again the boat owners and their agent (I B)

Reliance Financial Services Pty Ltd v Antalija Developments No 4 Pty Ltd (No 4) (NSWSC) - a trustee acts in the trustee's own name and is liable at law under for what the trustee does in that capacity, and the Court has no discretion to order otherwise (I B)

HABEAS CANEM

Catch for Australia

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Scarati v Republic of Italy [2023] FCA 1264
Federal Court of Australia
Thomas J
Contracts - Scarati is an Italian citizen resident in Australia, employed by the Republic of Italy at its Melbourne Consulate as an administrative assistant pursuant to a written contract - the preamble to the contract referred to a 1967 Presidential Decree and a 2000 Legislative Decree, as well as to the Australian Department of Foreign Affairs and Trade Certified Agreement 2006-2009 - Scarati contended that his employment was regulated (in addition to the terms of the contract) by the two Decrees, and that his contract therefore incorporated by reference the relevant terms contained in the 2006 DFAT Agreement and any subsequent replacement agreement - he contended Italy had failed to pay him wages in accordance with the 2006 DFAT Agreement - Scarati also said that, from 2010, his employment was regulated by the *Clerks - Private Sector Award 2010* or, alternatively the *Miscellaneous Award 2010*, and any subsequent replacement awards - Italy admitted that the *Miscellaneous Award* applied, but denied that the *Clerks Award* applied - Scarati sought declaratory relief pursuant to s21 of the *Federal Court of Australia Act 1976* (Cth), the imposition of civil penalties for alleged contraventions of various provisions of the *Fair Work Act 2009* (Cth), and order for compensation under s545(2) of the *Fair Work Act*, and damages for breach of contract by reason of an alleged underpayment of wages - Italy denied that either of the two Decrees or the 2006 DFAT Agreement were incorporated into the contract - Italy did not rely on any immunities under the *Foreign States Immunity Act 1985* (Cth) - the parties agreed that Scarati was a national system employee and Italy a national system employer, as those terms are defined in the *Fair Work Act* - held: the terms of the contract were to be determined objectively and not by reference to the subjective intentions of the parties - whether a document is incorporated into a contract depends on the language used in the contract - both the 1967 Presidential Decree and the 2000 Legislative Decree are laws in place in Italy, and the parties agreed that Italy was bound to observe both Decrees - the preamble did not contain the mandatory or promissory language which would lead the Court to a conclusion that mutual obligations were being created - the remunerative terms of the body of the contract were clear and unambiguous, and did not refer to the 2006 DFAT Agreement in any way - a reasonable person in the position of each of the parties would have understood that the terms and conditions of employment, including as to remuneration, were those contained in the body of the contract - the contract did not incorporate any of the 1967 Presidential Decree and the 2000 Legislative Decree, or the 2006 DFAT Agreement - as to the awards case, the construction of an industrial instrument depends on its language, understood in light of its industrial context and purpose - the interpretation of an award begins with a consideration of the natural and ordinary meaning of its words, and that approach is also taken when interpreting coverage clauses - the *Clerks Award* applied - Italy had breached that award by failing to pay leave loading - superannuation claims and long service leave claims to be determined at the next stage of the proceedings.
Scarati (I B)

Bloc Constructions (ACT) Pty Ltd v ABS Façade (ACT) Pty Ltd [2023] FCA 1282
Federal Court of Australia
Perry J
Security of payments - Bloc Constructions is a project delivery, planning and construction firm - ABS Façade is a business specialising in façade installation and rectification in the commercial building industry - Bloc contracted ABS to carry out works in relation to an apartment complex known as DKSN North - ABS made a disputed payment claim under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) - an adjudicator under that Act made a determination that Bloc had to pay ABS about $320,000 - Bloc sought judicial review of the adjudication determination, on the grounds that (1) the payment claim failed to identify the construction work or related goods and services to which it related, as required by s15(2)(a) of the Act; (2) the adjudicator failed to determine the payment to be made by Bloc, and so failed to carry out his statutory function under s24(1)(a) of the Act; and (3) no reference date under the contract existed for making the payment claim, and the adjudicator therefore lacked jurisdiction to entertain the adjudication application - held: s48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) vests the ACT Supreme Court with all jurisdiction necessary for the administration of justice in the ACT, and the ACT Supreme Court therefore has jurisdiction to grant common law prerogative relief for jurisdictional error with respect to decisions made under ACT legislation - the Federal Court has jurisdiction over all matters within the jurisdiction of the ACT Supreme Court under s9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) - the Court therefore had jurisdiction to decide this case - the payment claim satisfied the statutory requirement imposed by s15(2)(a) - the test under s15(2)(a) takes into account the background knowledge of each of the parties derived from their past dealings and exchanges of documentation - the background knowledge of each party here indicated that Bloc could understand the basis of the claim against it - s24(1)(a) imposes an obligation on an adjudicator to calculate the precise amount which a respondent must pay to a claimant - here, the adjudicator's decision made clear that he had calculated the amount to be paid - the figure to be paid was provided on the face of the adjudication document, under the heading "Adjudication Amount", and was repeated twice in the adjudicator's reasons, and the basis for reaching that conclusion was detailed in an itemised breakdown - the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim - the reference date as defined in s10(3) of the Act is relevantly "a date set by contractual force" - the contract provided a single reference date by which the "final payment claim" was to be made - the payment claim was made before this date - however, viewed objectively, the payment claim was clearly not a final payment claim for the purposes of the contract - rather the description of that payment claim as the "final claim" reflected the fact that that claim was made in circumstances where ABS was to hand over the remaining works to a replacement subcontractor - application dismissed.
Bloc Constructions (ACT) Pty Ltd (I B C)

Nguyen v Rickhuss [2023] NSWCA 249

Court of Appeal of New South Wales
Ward P; Leeming JA; & Basten AJA
Class actions - twelve plaintiffs commenced proceedings for themselves and on behalf of group members who had had breast augmentation surgery using the "TCI System" - the defendants were a number of companies with "The Cosmetic Institute" or "TCI" in their names, the surgical director of those companies, and ten medical practitioners who had been trained by that surgical director - the ten medical practitioners applied to the primary judge for a suite of orders, including that the litigation no longer proceed as representative proceedings - the primary judge dismissed this application - the ten medical practitioners applied for leave to appeal against the interlocutory decision rejecting the application that the litigation no longer proceed as representative proceedings - the grounds of appeal were that there were no substantial common questions, such that the criterion in s157(1)(c) of the *Civil Procedure Act 2005* (NSW) was not satisfied, and that the primary judge fell into *House v The King* error in exercising his discretion not to order that the litigation no longer proceed as representative proceedings - held: the Court did not accept the applicants' submission that whether the TCI System was deployed upon all patients, irrespective of their personal characteristics, is not a common question of fact - there was no basis in the text or context to construe "common question of law or fact" in s157(1)(c) narrowly - it is settled law that s157(1)(c) (and its federal counterpart, s33C(1) of the *Federal Court of Australia Act 1976* (Cth)) is concerned with the commencement, not subsequent conduct, of litigation - whether the TCI System was applied universally and undiscriminatingly to group members was in issue on the pleadings, and was a common question of fact, notwithstanding that the applicants may in due course resist that allegation by reference to evidence from particular cases - the separate question whether the TCI System increased the risk of harm to patients was also a common question of fact - the old English approach of a three step approach to identifying a common question of law or fact (assume each group member proceeds separately, identity all legal and factual questions in each action, identify whether there is a question of law or fact that would recur in each action) said to derive from *Universities of Oxford and Cambridge v George Gill & Sons* [1899] 1 Ch 55, does not apply in modern Australian representative proceedings - the Court noted that it would be remarkable if, after some three decades of representative proceedings brought pursuant to provisions cognate with Part IVA of the *Federal Court of Australia Act*, it had been overlooked that whether there was a "common question of law or fact" was required to be determined by the methodology said to derive from the *Universities* case - as to the second ground of appeal, it had been open to the primary judge to determine that it was appropriate, at this stage, for the proceedings to continue as representative proceedings - leave to appeal granted, but appeal dismissed.
View Decision (I B)

Farriss v Axford [2023] NSWCA 255
Court of Appeal of New South Wales
Meagher & Mitchelmore JJA, & Simpson AJA
Negligence - Farriss, a founding member and lead guitarist of INXS, charted a boat, "Omega",

for the purpose of cruising around Pittwater with his wife over the 2015 Australia Day long weekend - Farriss suffered serious injuries to his left hand when it became entangled in Omega's electric anchor chain lowering and raising mechanism - Farriss claimed damages for negligence of, and for failure to comply with statutory guarantees by, the owners of Omega and their agent in chartering Omega - Montana Productions Pty Ltd, of which Farriss and his wife are directors, claimed damages for economic loss consequent upon Farriss' injury - the primary judge dismissed the proceedings, and contingently assessed damages as $622,000 for Farriss and $40,000 for Montana - Farris and Montana appealed - held: it was uncontroversial that each respondent owed Farriss a duty of care - when applying s5B and s5C of the *Civil Liability Act 2002* (NSW), the identification of the risk of harm informs the nature and extent of precautions that the respondents ought reasonably to have taken in response to that risk - the risk should not be confined to the precise circumstances giving rise to Farriss' injury, although it should be capable of encompassing those circumstances - the primary judge had accepted that both a chain stripper and an additional spurling pipe could have been installed prior to the accident, and would have prevented the accident, but was not satisfied that the risk of harm, examined prospectively, was such as to require the respondents to take those precautions in discharge of their duty of care, on the basis that, while the risk of harm was foreseeable and not insignificant, the probability that harm would occur if the relevant precautions were not taken was low - there had been no prior complaint about or incident involving the anchor, and those persons who had inspected or serviced Omega had never recommended to the respondents that the additional components be installed - the respondents had been entitled to rely on the absence of any such recommendation - the primary judge had not erred in finding that the respondents had not breached their duty of care in this respect - the primary judge also had not erred in finding that the respondents had not been negligent in failing to instruct, warn, inform, and induct Farriss as to the features of Omega, including the risks associated with use of the electric anchoring system - the Court of Appeal was not satisfied that, had Farriss been given the warning he said he should have been given, he would not have proceeded with the charter - regarding the claims for failure to comply with the statutory guarantees under the *Australian Consumer Law*, in order to succeed on the boat being not reasonably fit for purpose, Farriss would have to show that he had made his inexperience known to the respondents, such that it could follow, from the propensity of the anchor to kink and the mechanism to stall, that Omega was not reasonably fit for the purpose of Farriss having a relaxing leisure cruise - this ground of appeal also failed - appeal dismissed.
View Decision (I B)

Reliance Financial Services Pty Ltd v Antalija Developments No 4 Pty Ltd (No 4) [2023] NSWSC 1260
Supreme Court of New South Wales
Robb J
Trusts - the Court had previously given judgement in these proceedings - Antalija Developments No 4 Pty Ltd was the trustee of a unit trust - Price, as trustee of a discretionary trust, held units in that unit trust - Price, again as trustee of that discretionary trust, had borrowed money from

Marginata Securities Pty Ltd - the Court had held that any money payable by Antalija to Price as unit holder was charged for repayment of the loan to Marginata - the Court ordered Price to pay Marginata's costs, but gave leave to seek variation of this - Price applied that the costs order be varied to state that she was entitled to be indemnified out of the assets of the discretionary trust, and that her liability for costs be limited to the assets of the discretionary trust - Marginata stated it had no interest in whether Price was entitled to be indemnified out of the discretionary trust, but resisted the proposition that the costs order should be limited to the assets of that discretionary trust - held: if Price wished the Court to make an order that she was entitled to be indemnified out of the assets of the discretionary trust, it would be necessary for her to join as a respondent to her notice of motion a discretionary beneficiary (who could be appointed to represent all beneficiaries) or a new trustee (if there was one) - the Court could not make an order in favour of Price that would take effect against the assets of the discretionary trust without an interested respondent being made a party to contest her application - the only real issue in the proceedings is whether the Court should make an order that Price's liability for costs be limited to the assets of the discretionary trust - it is the clearest of legal propositions that a trustee contracts in the trustee's own name and is liable at law under the contracts that the trustee makes in the trustee's capacity as such - a trustee's only recourse if it becomes liable to a third party by reason of its actions as trustee is to enforce its indemnity against the trust assets, if those assets are sufficient to meet the indemnity - the Court has no discretion to relieve a trustee from this personal liability - Price's submissions based on authorities dealing with the making of costs orders against liquidators of companies were based on a false analogy - while Price may have acted honourably in attempting to defend Marginata's claim for the benefit of the beneficiaries of the discretionary trust, she had taken the risk that the assets of the discretionary trust would not be sufficient to satisfy her right to be indemnified against the costs order made against her - application to vary costs order dismissed.
View Decision (I B)

Poem for Friday

Loves Poem

By: Theocritus (c. 300 BC, to circa 260 BC)

'Sincerity comes with the wine-cup,' my dear:
Then now o'er our wine-cups let us be sincere.
My soul's treasured secret to you I'll impart;
It is this; that I never won fairly your heart.
One half of my life, I am conscious, has flown;
The residue lives on your image alone.
You are kind, and I dream I'm in paradise then;
You are angry, and lo! all is darkness again.
It is right to torment one who loves you? Obey
Your elder; 'twere best; and you'll thank me one day.
Settle down in one nest on one tree (taking care
That no cruel reptile can clamber up there):
As it is with your lovers you're fairly perplexed;
One day you choose one bough, another the next.
Whoe'er at all struck by your graces appears,
Is more to you straight than the comrade of years;
While he's like the friend of a day put aside;
For the breath of your nostrils, I think, is your pride.
Form a friendship, for life, with some likely young lad;
So doing, in honour your name shall be had.
Nor would Love use you hardly; though lightly can he
Bind strong men in chains, and has wrought upon me
Till the steel is as wax- but I'm longing to press
That exquisite mouth with a clinging caress.

No? Reflect that you're older each year than the last;
That we all must grow gray, and the wrinkles come fast.
Reflect, ere you spurn me, that youth at his sides
Wears wings; and once gone, all pursuit he derides:
Nor are men over keen to catch charms as they fly.
Think of this and be gentle, be loving as I:
When your years are maturer, we two shall be then
The pair in the Iliad over again.
But if you consign all my words to the wind
And say, 'Why annoy me? you're not to my mind,'
I- who lately in quest of the Gold Fruit had sped

For your sake, or of Cerberus guard of the dead-
Though you called me, would ne'er stir a foot from my door,
For my love and my sorrow thenceforth will be o'er.

Translated by C. S. Calverley

Theocritus (300BC to 260 BC) was a Greek Poet, the creator of Ancient Greek pastoral poetry, (termed “bucolics”). The pastorals introduced the setting of shepherds, and shepherdesses and nymphs and were the source of inspiration for much later poetry including John Milton, Percy Bysshe Shelley and Matthew Arnold. He is believed to have lived in Sicily as he refers to the Cyclops in the Odyssey as his “countryman”, however he may have been born in Syracuse. A number of works attributed to Theocritus are thought now to be of doubtful authenticity.

Click Here to access our Benchmark Search Engine